88-1361

Supreme Court, U.S.
FILED
FEB 15 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

TINA DARLENE WALLS,

Petitioner,

v.

STATE OF ALABAMA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE ALABAMA COURT OF CRIMINAL APPEALS

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QUESTIONS PRESENTED

1. Whether the execution of a search warrant by those persons unauthorized to execute search warrants by state law was an illegal search in violation of the Fourth Amendment?

PARTIES

The parties to this preceeding are Tina Darlene Walls and the State of Alabama.

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Code of Alabama 1975, § 15-5-5	*passim*
Code of Alabama 1975, § 15-5-7	*passim*

OPINIONS BELOW

1. The published opinion of the Alabama Court of Criminal Appeals affirming the Petitioner's conviction is reproduced as Appendix I, hereto (1a).

2. The Alabama Supreme Court did not issue an opinion. Its unpublished order denying the petition for writ of certiorari to review the Court of Criminal Appeals affirmance is reproduced as Appendix II, hereto (6a).

JURISDICTION

The order of the Alabama Supreme Court denying the petition for certiorari review of the Alabama Court of Criminal Appeals affirmance is dated December 23, 1988 (6a). The Statutory provision which confers upon the court jurisdiction to review the judgment or decree in question by writ of certiorari is 28 U.S.C. Section 1257(3), which provides that judgments or decrees rendered by the highest court of a state in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari, or any title, right, privilege or immunity especially set up or claimed under the Constitution of the United States.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. United States Constitution Amendment IV, which provides the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized.

2. Code of Alabama, 1975, § 15-5-1, "Search warrant" defined: A "search warrant" is an order in writing in the name of the state, signed by a judge, or by a magistrate authorized by law to issue search warrants, and directed to the sheriff or to any constable of the county, commanding him to search for personal property and bring it before the court issuing the warrant.

3. Code of Alabama, 1975, § 15-5-5, Issuance of a warrant: If the judge or the magistrate is satisfied of the existence of the grounds of the application or that there is probable ground to believe their existence, he must issue a search warrant signed by him and directed to the sheriff or to any constable of the county, commanding him forthwith to search the person or place named, for the property specified and to bring it before the court issuing the warrant.

4. Code of Alabama 1975, § 15-5-7, By whom executed: A search warrant may be executed by any one of the officers to whom it is directed, but by no other person except in aid of such officer at his request, he being present and acting in its execution.

STATEMENT OF THE CASE

The Procedural History

On September 24, 1986, the petitioner was indicted by a Mobile County Grand Jury for possession of marijuana and cocaine in violation of Section 20-2-70, Code of Alabama 1975. (CR-1) The indictment was based on evidence seized from the petitioner's residence pursuant to a search warrant executed by members of the Mobile City Police Department. (CR-10) The petitioner pled not guilty to the charges. (CR-4)

The petitioner then made motions to suppress any evidence seized under the warrant above on the grounds that her rights under the Fourth Amendment to the United States Constitution were violated and on the grounds that the search warrant was neither directed to or executed by the Sheriff of Mobile County, one of his deputies, or a constable, as required by Section 15-5-1, 15-5-5, and 15-5-7, Code of Alabama 1975. (CR-9, CR-10)

The petitioner waived her right to trial by jury and testimony before District Judge Lionel L. Layden began on November 2, 1987. (CR-11) At that hearing, testimony was taken from Corporal Sam Cochran of the Mobile City Police Department and the petitioner argued both motions to suppress which have been previously filed, as well as orally raising Fourth Amendment grounds for suppression. (1stRT-3-33) The trial judge took the motion under submission and reset the case for further testimony on November 6, 1987 (CR-11, 1stRT-33) On that date, Corporal Cochran testified solely for the purpose of establishing whether or not he was a deputy sheriff for the purpose of executing the search warrant, and for the purposes of the motions to suppress on those grounds. (2ndRT-16) On that date, the trial judge denied both motions to suppress and found the petitioner guilty. (CR-13-14, 2ndRT-20) The petitioner was given a seven year sentence on January 6, 1988, and the petitioner's attorney then gave oral notice of appeal. (CR-21, 2ndRT-23).

The Factual History

This case began when Corporal Sam Cochran of the Mobile City Police Department received infor-

mation from an informant that certain persons, including the petitioner, who were residing at a house at 6424 Gaslight Lane North, in Mobile, Alabama were possibly engaged in drug trafficking. (CR-60, 1stRT-5) Based on this information, Corporal Cochran and another member of the Mobile Police Department placed the residence under surveillance and noted that there were vehicles with out-of-town plates coming and going from the residence. (CR-60, 1stRT-5) As part of their continuing investigation, police officers retrieved two bags of garbage from the curb at the front of the residence and searched through them, finding two hand-rolled cigarette butts, some green stalks and some plastic baggies with the corners torn off. (CR-60, 1stRT-6) Based on verbal confirmation from the Mobile Police Department Crime Laboratory that the stalks and butts tested positive for marijuana, Corporal Cochran requested that a search warrant be issued. (CR-60, 1stRT-6) The district judge issued the search warrant to Corporal Cochran on May 15, 1986. (1stRT-7) Evidence was seized pursuant to the warrant, and the petitioner was subsequently indicted by a Mobile County Grand Jury for possession of marijuana and cocaine. (CR-1)

The petitioner filed motions to suppress the evidence seized pursuant to the warrant, alleging lack of compliance with the Fourth and Fifth Amendments to the United States Constitution and with Sections 15-5-5 and 15-5-7, Code of Alabama 1975. (CR-9, CR-10) The trial judge took testimony from Corporal Sam Cochran, the Mobile City Police officer who obtained and executed the warrants, and denied both of the motions to suppress, finding the petitioner guilty. (CR-13-14, 2ndRT-20)

REASON FOR GRANTING THE WRIT

THE TRIAL COURT ERRED BY DENYING THE PETITIONER'S REQUEST THAT ANY EVIDENCE SEIZED FROM THE PETITIONER'S RESIDENCE BE SUPPRESSED BECAUSE OF THE STATE'S FAILURE TO COMPLY WITH SECTIONS 15-5-5 AND 15-5-7, CODE OF ALABAMA 1975

Corporal Sam Cochran the officer who requested and executed the search warrant in this case is a member of the Mobile Police Department. (CR-60, 1stRT-4) The other officers who executed the warrant along with Corporal Cochran were also members of the Mobile Police Department. (1stRT-7)

The petitioner filed a motion to suppress any evidence seized in this case pursuant to the search warrant issued on the grounds that there is a lack of compliance with Sections 15-5-1 and 15-5-5, Code of Alabama, which required that search warrants must issue or be directed to a sheriff or by his deputy, and Section 15-5-7, which requires that a search warrant must also be executed by the same. Section 15-5-1, 15-5-5 and 15-5-7, Code of Alabama 1975. Testimony on this motion was taken at the first hearing. (1stRT-27-31) The trial judge took the matter under submission. (1stRT-33)

At the second trial hearing, the court accepted briefs from the parties and took testimony from Corporal Cochran. (2ndRT-3-15) The petitioner objected to further testimony from Corporal Cochran, and was overruled. (2ndRT-5) At that hearing, Corporal Cochran testified that there were no Mobile County Deputy Sheriffs present during the execution of the search warrant. (2ndRT-6) He further testified that he had been deputized. (2ndRT-6)

On cross-examination Corporal Cochran testified that he was not paid by the sheriff's department; that he had not posted a bond as a deputy sheriff; that the sheriff's office had nothing to do with this case; that the sheriff has no supervisory power over him; that you can't be employed by both the Mobile Police Department and the Sheriff's Office; that neither he nor anyone else identified themselves on the search as members of the sheriff's department; and that the only time that he represents himself as a deputy sheriff is when testifying in a motion to suppress such as this one. (2ndRT-8-14) On November 20, after again taking the matter under submission, the trial judge denied the petitioner's motion to suppress based on lack of compliance with Sections 15-5-5 and 15-5-7, Code of Alabama 1975.

In 1981, the Alabama Court of Criminal Appeals declared that, in order for a search warrant to be legal, that warrant must be executed by or at the direction of county officials. *Rivers vs. State*, 406 So.2d 1021 (Ala.Cr.App. 1981). The *Rivers* decision was based on Sections 15-5-5 and 15-5-7, Code of Alabama 1975 and *United States vs. Martin*, 600 F.2d 1175 (5th Cir. 1979). Otherwise, the Court of Criminal Appeals also issued *Malone vs. State*, where the denial of a motion to suppress based upon the fact that the executing officers were not deputy sheriffs was affirmed. *Malone vs. State*, 406 So.2d 1060 (Ala.Cr.App. 1981). The deputies in *Malone*, even though they had not filed a copy of their oath with the probate court in their county nor filed a bond, maintained an office at the county jail, were entrusted with the only set of keys to the jail, and did not work as municipal police officers. *Id.* at 517.

The next case in this line was *Ex Parte Hicks*, where the Alabama Supreme Court ruled that *municipal* judges have the authority to issue search warrants to *municipal* officers because of the statutory provisions of Sections 12-14-4 and 12-14-32, Code of Alabama 1975. *Ex Parte Hicks*, 437 So.2d 1346 (Ala. 1983) The court found no conflict with *Rivers*, alleging that this was essentially a different issue, and did not overrule *Rivers*. *Id.* at 1347.

In *Gamble vs. State*, 473 So.2d 1188, the court upheld the execution of a search warrant executed by a municipal officer because two regular Montgomery County deputy sheriffs were present.

In *Cowart vs. State*, 488 So.2d 497 (Ala.Cr.App. 1985), the court upheld the execution of a search warrant by a Mobile police officer simply because he had been deputized. *Cowart's* holding is based *solely* on *Walden*, which bases its pertinent holding *solely* on *Malone*, where, again, there are numerous other indicia of *true* deputy status. *Id.* at 502.

In *Yeager vs. State*, 500 So.2d 1260 (Ala.Cr.App. 1986), the execution of a warrant by private citizens was upheld because an actual deputy sheriff obtained and participated in the execution of the search warrant in question.

Finally, in *Williams vs. State*, 505 So.2d 1260 (Ala.Cr.App. 1986), the court affirmed the execution of a search warrant by a municipal officer because it was obtained from a municipal judge who has statutory authority to do such acts.

The Court of Criminal Appeals ruled that Officer Cochran was a deputy sheriff within the meaning of § 15-5-5 Code of Alabama 1975. The opinion states

that the Appellant "argues that he was deputized only for the purpose of getting around the technicalities of the code".

It is respectfully submitted that it is just not our argument, but also the testimony of Officer Cochran himself. He testified that the only time he represented himself as a deputy sheriff was when he testified in a motion to suppress, such as the one in this case. (RT-13-14) This "deputizing" the entire police force is an obvious sham to circumvent the code requirements.

Officer Cochran also admitted that he was not paid by the Sheriff's Department of Mobile; that he had not posted a bond as a deputy sheriff; that the sheriff's office had nothing to do with this case; that the sheriff has no supervisory power over him; that you can't be employed by both the Mobile Police Department and the Mobile Sheriff's Office; that neither he nor anyone else identified themselves on the search as members of the sheriff's department; and that the only time that he represents himself as a deputy sheriff is when testifying on a motion to suppress.

The Fifth Circuit case of *U.S. vs. Martin*, 600 F.2d 1175, presents a similar factual setting citing the Alabama Statutes. The court ruled that since no one was present who was authorized under state law to exercise the state search warrant, the seizure amounted to a warrantless search. The same reasoning should apply in this case.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX I

THE STATE OF ALABAMA—JUDICIAL DEPARTMENT
THE ALABAMA COURT OF CRIMINAL APPEALS
OCTOBER TERM, 1987-88

RELEASED
AUG 23 1988

1 Div. 633

TINA DARLENE WALLS

v.

STATE
APPEAL FROM MOBILE CIRCUIT COURT

TAYLOR, JUDGE

Appellant Tina Darlene Walls was indicted for possession of marijuana and possession of cocaine. Each of these offenses is proscribed by §20-2-70, Code of Alabama 1975. Appellant made motions to suppress evidence which was seized from her home pursuant to a search warrant. After taking testimony and hearing counsel's legal arguments on November 2, 6, and 20, 1987, the trial judge denied these motions to suppress. On the same day the motions were denied, the trial judge found appellant guilty as charged. He then sentenced appellant to seven years, two years to be served in the penitentiary and five years on probation.

The affidavit for the search warrant stated:

> "I am Corporal Sam Cochran of the Mobile Police Department Narcotic Section. I recently received information from a confidential source that the persons residing at 6424 Gaslight Lane North in the Carriage Hills subdivision of Mobile were possibly engaged in trafficking in controlled substances. Based on this information, I con-

ducted an investigation in regards to the occupants, and as to persons coming to and from the residence. Surveillance of this residence on numerous occasions revealed several vehicles, more than a dozen, with out of town plates coming to this residence and only staying for short periods of time, not normal periods as usually associated with out of town guests. Investigation also determined the female resident, Tina M. Walls to be unemployed. The investigation failed to reveal any occupation for Perry W. Davis believed to be the male resident. Based on these facts and as part of the continuing investigation, on May 12, 1986, myself and Corporal T. Hicks of the Mobile Police Department Narcotic Section retrieved two garbage bags from the neutral ground in front of the residence at 6424 Gaslight Lane North. We searched through these bags which had been tied at the tops. Resulting from this search were several items of mail addressed to 6424 Gaslight Lane North and also several green stalks, two handrolled cigarette butts, and some plastic baggies with the corners torn off.

"I submitted these items to the Police Department Crime Laboratory on May 13, 1986, and on this same date I received verbal confirmation from Ms. Darlene Lafitte, Crime Laboratory Technician, that, the stalks and butts tested positive for Marijuana.

"Based on my experience as a Narcotics officer, I am aware that stalks and stems such as those recovered are normally discarded by persons who are 'breaking up' or separating Marijuana for sale and/or use.

"For above state reasons I request that search warrant be issued."

A Mobile County district judge then issued the search warrant. Officer Cochran, other police officers, and ABI agents searched appellant's home. They found several plastic baggies containing white powder believed to be cocaine, a "coke" sifter, a brass mirror, several straws, and a razor with white powder residue. They found several bags of a green plant material believed to be marijuana, several "roach clips," assorted hand rolling papers, and other drug related items. Subsequent testing established that the material seized was indeed cocaine and marijuana. They also found several thousand dollars in cash and twenty-five guns. Appellant, her boyfriend, and her boyfriend's brother were read their *Miranda* rights and arrested. As the law enforcement officers located the items, appellant Walls would voluntarily state that each item was hers.

I

Walls now contends that the search warrant was issued without sufficient probable cause. She argues that the officers "could not tell where [the garbage] came from and whose garbage it was," and that there was therefore insufficient probable cause to issue the search warrant. Appellant's allegation is factually incorrect. The affidavit states that there were several items of mail addressed to appellant's residence found in the garbage. The garbage bags were also located in front of appellant's residence. The officers reasonably believed that this was Wall's garbage.

Under the "totality of the circumstances" test of *Illinois v. Gates*, 462 U.S. 213, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983), the district judge could have found, and did find, ample grounds to issue a search warrant. The confidential tip, the surveillance which revealed frequent and short out-of-town visits from many different people, the unemployed status of all of the residents of appellant's household, and the marijuana stems found in the garbage, when taken together, certainly provide common sense information of

a substantial character from which the district judge could have found probable cause. Thus, the district judge correctly issued the search warrant. The trial judge, then, did not err by denying appellant's motion to suppress on this basis.

We note that the search of appellant's garbage did not violate a proprietary interest in it. *See, e.g., California v. Greenwood and Van Houten*, 57 U.S.L.W. 4409 (May 17, 1988).

II

Appellant also argues that the search was not done by a sheriff, in violation of §§15-5-5, -6 and -7, Code of Alabama 1975, and was therefore invalid. These Code sections require that a warrant be "directed to the sheriff or to any constable of the county." §15-5-5. It then must be executed by one of the officers to whom it is directed. §15-5-7. The issuance and execution of the warrant must strictly comply with the language of the Code. *United States v. Martin*, 600 F.2d 1175 (5th Cir. 1979). If the warrant is not directed to a county official, as required, evidence found in the search must be suppressed. *Rivers v. State*, 406 So.2d 1021 (Ala. Cr. App.), cert. denied, 406 So.2d 1023 (Ala. 1981)

Walls contends that Corporal Cochran, a member of the Mobile Police Department, is not a "sheriff or any constable of the county" within the meaning of §15-5-5. Appellant admits that Officer Cochran was legally and timely deputized by the sheriff, a fairly common practice. She argues that he was deputized only for the purpose of getting around the technicalities of the Code. Appellant states that Officer Cochran is employed by the Mobile Police Department and not by the sheriff. Appellant, therefore, argues that Officer Cochran is not a valid deputy sheriff. However, simply because an officer cannot be paid as both a deputy sheriff and a municipal police officer does not

prohibit the officer from performing the duties of a deputy sheriff. *Walden v. State*, 426 So.2d 515 (Ala. Cr. App. 1982). Officer Cochran was duly sworn in as a deputy sheriff. The statutes were therefore obeyed. The execution of the warrant of Officer Cochran in his capacity as a deputy sheriff was lawful. The trial court correctly denied appellant's motion to suppress.

AFFIRMED.

ALL THE JUDGES CONCUR.

APPENDIX II

THE STATE OF ALABAMA—JUDICIAL DEPARTMENT IN THE SUPREME COURT OF ALABAMA

December 23, 1988

88-112

EX PARTE: Tina Darlene Walls

PETITION FOR WRIT OF CERTIORARI

(Re: Tina Darlene Walls v. State)

CCA 1/663

CERTIFICATE OF JUDGMENT WRIT DENIED

The above cause having been duly submitted, IT IS CONSIDERED AND ORDERED that the petition for writ of certiorari be denied.

Houston, J.—Torbert, CJ., Maddox, Almon & Beatty, JJ.

I, Robert G. Esdale, as Clerk of the Supreme Court of Alabama, do hereby certify that the respond, a full, tue and correct copy of the instrumendly herewith setout as same appear(s) of record in said court.
Witness my hand this 23 day of Dec 1988

/s/ Robert G. Esdale
Clerk, Supreme Court of Alabama